The Commission issued an order ratifying the appointment of all five of its administrative law judges with respect to pending administrative proceedings. The order comes one day after the government reversed course and told the Supreme Court in its reply to Raymond J. Lucia’s certiorari petition challenging the SEC’s administrative law judges on constitutional grounds that the SEC’s ALJs are inferior officers and not employees. The government reasoned that SEC ALJs exercise “significant authority” which, under Supreme Court precedent, makes them officers subject to the requirements of the U.S. Constitution’s Appointments Clause. The order announced by the Commission may delay some in-house proceedings for up to several months while the Commission’s ALJs reconsider those proceedings (In re: Pending Administrative Proceedings, Release No. 33-10440, November 30, 2017).

Reconsideration of pending proceedings. The Commission’s order addresses two sets of pending administrative proceedings, those in which an ALJ has not yet issued an initial decision, and those in which the ALJ has issued an initial decision. In both instances, the Commission has ordered its ALJs to reconsider each pending proceeding as follows:

• Reconsider the record and all actions taken under Rule 111 of the Commission’s Rules of Practice. (That rule grants ALJs authority to conduct administrative proceedings, including to administer oaths or affirmations, issue subpoenas, take evidence, regulate proceedings, hold conferences, make recusal decisions, order an SEC division to specify against whom evidence will be presented if there are multiple respondents, rule on motions, prepare an initial decision, reopen a hearing, and to advise the parties of alternative dispute resolution opportunities);
• Order the parties to submit any new evidence relevant to the ALJ’s reconsideration by January 5, 2018;
• Determine whether to ratify or revise all prior actions taken by the ALJ in the proceeding; and
• Issue an order that the ALJ’s reconsideration of the proceeding is complete and state a determination regarding ratification by February 16, 2018.

An appendix to the Commission’s order lists 104 administrative proceedings that are subject to reconsideration by the Commission’s ALJs for which an initial decision has been issued. Among the proceedings impacted are several involving respondents that had previously asked federal district courts to halt their SEC proceedings because of the Appointments Clause issue. These include proceedings against Barbara Duka and Laurie Bebo. Notably absent from the list is the recently concluded proceeding against Lynn Tilton, who persuaded an ALJ that she did not violate federal securities laws. The Commission issued a notice of finality the day before the government submitted its reply brief in the Lucia case and observed that the Division of Enforcement had not sought Commission review and the Commission itself had not elected to review the Tilton initial decision. Tilton, like many other SEC respondents, had raised the constitutional question in federal court.

An easy solution. The Commission’s decision to ratify the appointment of its ALJs mirrors a suggestion offered by a U.S. district court judge in Atlanta in some of the early cases challenging the constitutionality of the SEC’s ALJs. Judge Leigh Martin May, in two opinions regarding the court’s jurisdiction to hear complaints about the SEC’s ALJs before an adverse Commission opinion was issued (Gray Financial and Charles Hill), proposed that the SEC might cure its Article II problem by appointing its own ALJs or by itself presiding over administrative proceedings.
Following Judge May’s lead, Judge Richard Berman of the U.S. District Court for the Southern District of New York issued an opinion in Duka’s case against the SEC noting the Commission was considering a "cure" to the Article II issue and allowing the SEC time to implement that cure before he eventually enjoined the Duka proceeding. The numerous district court cases across the country ultimately floundered and the Supreme Court denied certiorari in a several of them (the justices also declined to hear a case appealing the denial of a petition for review because the Article II question arose only at the rehearing stage (Pierce). During this time frame, the Federal Trade Commission did take the step suggested by Judge May and ratified the appointment of an ALJ.

**Impact on cases appealable to Tenth Circuit.** In addition to the Lucia certiorari petition now pending before the Supreme Court, a separate certiorari petition in a Tenth Circuit case (Bandimere) is also pending before the Supreme Court. In Bandimere, a majority of the Tenth Circuit held, over a lengthy dissent, that the SEC’s ALJs are inferior officers subject to the Appointments Clause. The government earlier this year had asked the justices to hold the Bandimere petition because, in the government’s view, Lucia was the better vehicle for the Supreme Court to address the question of whether the SEC’s ALJs are officers or employees.

After the Bandimere decision, the Commission stayed all pending administrative proceedings where the respondent could file a petition for review in the Tenth Circuit. The Commission’s order ratifying the appointment of its ALJs lifts that stay. According to the Commission’s order, proceedings that could be appealed to the Tenth Circuit will resume, although they also will be subject to the Commission’s order that the ALJs in those proceedings reconsider their prior actions.

**What’s next.** The Supreme Court will decide in the coming weeks or months whether to hear the Lucia and Bandimere cases. Significantly, the government’s reply to Lucia’s certiorari petition asked the justices, if they take the case, to add a new question presented that would deal with the related removal issue. The government raised the removal issue after identifying up to three layers of good cause tenure protection for the SEC’s ALJs that may violate separation of powers principles. In Free Enterprise, the Supreme Court dealt with a similar issue by severing the tenure provision from the Sarbanes-Oxley Act such that the Commission now can remove at will members of the Public Company Accounting Oversight Board.

The government in its Lucia brief also said the justices should address the appointments and removal issues together to avoid "severe disruption" of administrative proceedings. Justice Breyer’s dissent in Free Enterprise cataloged the potential disruptions all federal agencies using ALJs could face by looking ahead to the impact of any future Supreme Court decision on the constitutionality of ALJs.

As for the Appointments Clause issue, the D.C. Circuit’s opinion in Lucia upheld the SEC’s ALJs and set the stage for the later conflict with the Tenth Circuit’s Bandimere opinion. The D.C. Circuit’s Lucia opinion had focused prominently on the SEC ALJs’ lack of finality based on the court’s earlier Landry opinion upholding the FDIC’s ALJs because they lacked finality (a concurrence in Landry noted that, under the Supreme Court’s Freytag opinion, finality was not necessarily the touchstone for officer status). The government’s reply in Lucia said the D.C. Circuit had over-emphasized the role of finality in determining that the SEC’s ALJs were employees.

It remains to be seen if the Commission’s order ratifying the appointment of its ALJs will impact the Appointments Clause part of the Lucia and Bandimere certiorari petitions. The SEC, as parties in the ALJ cases have often done, could appraise courts with pending ALJ cases of its ratification order, as it did yesterday in a least one pending case (e.g., Timbervest) when it noted the government’s reply to the Lucia certiorari petition.

Meanwhile, the government has asked the Supreme Court to appoint an amicus curiae to defend the judgment below in Lucia if the court takes the case. But if the Supreme Court elects not to hear cases involving the SEC’s ALJs, the justices still could be asked to review a future Fifth Circuit opinion on the topic. The Fifth Circuit has already concluded, for purposes of a request to stay an FDIC order, that the FDIC’s ALJs are officers, a view that conflicts with the D.C. Circuit’s Landry opinion. Briefing on the merits is ongoing in the Fifth Circuit case.

The release is No. 33-10440.
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